IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1663

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, ET AL., *Petitioners*

v.

PENSION BENEFIT GUARANTY CORPORATION, AND BREWERY WORKERS PENSION FUND, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 10, 1979.

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[1] The caption includes the following appellant trustees of the Teamsters Fund who similarly file this petition for certiorari: Rocco DePerno, Stanley Clayton, Irving Wisch, Lyle Dixon, Kepler Vincent, Victor Mousseau, Paul Bush, and Charles H. Mosley, Sr., administrator.

OPINIONS BELOW

The opinion of the Court of Appeals and the memorandum opinion of the United States District Court appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 10, 1979. A timely Petition for Reconsideration and Suggestion that the Case Be Heard En Banc was denied on February 27, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Employment Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq.*), hereinafter "ERISA" or "the Act" is a comprehensive federal statute regulating private pensions and other employee benefit programs. Sections 208 and 1015(1) (29 U.S.C. 1058 and 26 U.S.C. 414(l)) prohibit a merger of pension funds which result in the dilution of pension benefits.[2] Section 514 of the Act (29 U.S.C. 1144) provides for preemption of all state laws relating to any employee benefit plan with the exception of any "cause of action which arose, or any act or omission which occurred before January, 1975." The questions presented are:

[2] In essence, the merger of two pension plans is prohibited unless each participant would be entitled to receive a benefit "immediately after the merger . . . equal to or greater than the benefit he would have been entitled to receive immediately before the merger." The restriction applies to multiemployer plans only to the extent determined by the PBGC. Sections 208 and 1015(1).

(1) Whether a pre-ERISA execution and repudiation of a merger agreement gave rise to a cause of action within the meaning of § 514(b)1) precluding application of ERISA, notwithstanding that an express condition of the merger agreement, IRS approval, and the actual merger, the statutory event, could only and did take place more than two years subsequent to the effective date of ERISA.

(2) Whether the Court of Appeals in reaching its decision holding ERISA inapplicable to the merger agreement, improperly invoked and misapplied principles of anticipatory breach of contract, and thereby decided an important federal question in a way in conflict with decisions of this Court.

(3) Whether the lower court improperly denied application of the statutory protections of §§ 208 and 1015(1) on the ground that it would be "anomalous" to hold that state law governed the respondent's cause of action to force steps preliminary to the actual merger while ERISA controlled subsequent action to bring the merger to fruition.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

§ 414. Definition and Special Rules

(l) Mergers And Consolidations Of Plans Or Transfers Of Plan Assets.—A trust which forms a part of a plan shall not constitute a qualified trust under section 401 and a plan shall be treated as not described in section 403(a) or 405 unless in the case of any merger or consolidation of the plan with, or in the case of any transfer of assets or liabilities of such plan to, any other trust plan after the date of the enactment of the Employee

Retirement Income Security Act of 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). This paragraph shall apply in the case of a multiemployer plan only to the extent determined by the Pension Benefit Guaranty Corporation. (ERISA, Section 1015)

United States Code, Title 29:

§ 1058. Mergers and consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with or transfer its assets or liabilities to any other plan after the date of enactment of this Act [Sept. 2, 1974], unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation or transfer (if the plan had then terminated). This paragraph shall apply in the case of a multiemployer plan only to the extent determined by the Pension Benefit Guaranty Corp. (ERISA, Section 208)

§ 1132. Civil enforcement

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section. (ERISA, Section 502)

§ 1144. Effect on other laws

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b)(1) This section shall not aply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975. (ERISA, Section 514)

STATEMENT OF THE CASE[3]

On January 19, 1977 the Teamsters Fund filed this action in U.S. District Court for the District of Columbia seeking a declaration that §§ 208 and 1015(1) are applicable to mergers involving multiemployer plans, and a mandatory injunction directing the PBGC to assert jurisdiction over the imminent merger, and to determine whether it should be prohibited pursuant to the criteria set forth in §§ 208 and 1015(1).

The jurisdiction of the District Court was invoked pursuant to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), specifically §§ 502 (a)(3) and 4003(f) (29 U.S.C. 1132(a)(3) and 1303

[3] Unless otherwise noted, facts stated herein are derived from Appellant's Statement of Material Facts About Which there is No Genuine Issue (and uncontested supporting affidavits) filed in support of their Motion for Summary Judgment below. All references to the Appendix refer to the Appendix filed with the Court of Appeals.

(f), and the Administrative Procedure Act (5 U.S.C. 702).[4]

Petitioners New York State Teamsters Conference Pension and Retirement Fund (hereinafter "Teamsters Fund") is a multiemployer pension trust established pursuant to collective bargaining agreements between 13 different local unions in New York State and approximately 1,200 employers. Its principal office is located in Utica, New York. It has more than 25,000 participants and beneficiaries and holds assets in excess of $100,000,000.

Respondent Brewery Workers Pension Fund (hereinafter "Brewery Fund"), with a principal office in New York City, is also a multiemployer pension trust established pursuant to collective bargaining agreements. In August 1973 twenty-four employers contributed to the Brewery Fund on behalf of approximately 3,500 participating employees who belonged to two different locals. At that time the Brewery Fund held assets valued at approximately $30,000,000. Its liabilities are in excess of $70,000,000 (not including liability for benefits to retirees). Its assets are continually declining and the Fund currently operates at a loss of approximately $400,000 per month.

Respondent Pension Benefit Guaranty Corporation, hereinafter "PBGC" is a government corporation established by § 4002 of ERISA (29 U.S.C. 1302). Its principal function is to protect participants and beneficiaries from loss of benefits resulting from involuntary pension plan terminations through administration

[4] The Administrative Procedure Act is expressly made applicable to agency action pursuant to § 507 of the Act (29 U.S.C. 1137).

of a system of benefit insurance. Congress has charged the corporation to investigate mergers of multiemployer pension funds to make determinations as to whether particular mergers may take place. 29 U.S.C. 1058, 26 U.S.C. 414(1) (ERISA, Sections 208 and 1015(1).

On August 7, 1973, petitioners Teamsters Fund and respondents Brewery Fund entered into an "Agreement" and "Plan of Integration" to merge the Brewery Fund into the Teamsters Fund. Appendix, p. 70. The Agreement was expressly conditioned upon: (a) ratification of the merger agreement by the employees participating in the Brewery Fund and (b) approval by the IRS that the merger complied with the applicable provisions of the Internal Revenue Code relative to continued tax qualifications. Under the terms of the Agreement, the merger was to be consummated 30 days after the parties were informed that a merger application was approved by the IRS. Appendix, pp. 76-78, 79. In November of 1973 the participants in the Brewery Fund approved the merger agreement by mail ballot. The merger agreement was not submitted to the participants of the Teamsters Fund for approval.

On January 5, 1974, six months after the merger agreement was executed but before any transmission to the IRS was made, Rheingold Breweries, which was one of the two largest contributing employers to the Brewery Fund, announced that it intended to close its operations. Rheingold closed its New York brewery on February 1, 1974. The closing and loss of 1,500 employees for whom contributions would no longer be made impaired the actuarial solvency of the merger and would require a substantial reduction in pension

benefits for participants in the Teamsters Fund.[5] Thereupon, on February 15, 1974, the Teamsters Fund voted not to proceed with the proposed merger.

On May 24, 1974 the Brewery Workers filed suit in the Supreme Court of the State of New York (Queens County) to obtain specific performance of the merger agreement. The Teamsters defended against this suit on the ground that the curtailment of operations at Rheingold was a material change of conditions excusing performance of the merger agreement. On April 29, 1975 the New York Supreme Court granted summary judgment and specifically ordered the Teamsters Fund to carry out the terms of the merger agreement by executing those documents necessary to request approval of the merger from the IRS.[6] The Court's decision was founded exclusively upon common law contract principles. Appeals to the Appellate Division and the Court of Appeals proved unavailing. *Brewery Workers Pension Fund* v. *New York State Teamsters Conference Pension and Retirement Fund,* 49 A.D.2d 755, 374 N.Y.S.2d 590 (App.Div.2d Dept., 1975); leave

[5] The Brewery Fund's bleak economic condition was made worse when Schaeffer, the largest brewery in New York City, also closed its doors. Together Rheingold and Schaeffer had been responsible for 82% of the annual contributions made by all employers in the Brewery Workers Fund. The merger would create an unfunded liability in excess of $70,000,000 which would have to be borne by the Teamsters Fund. While the closing of Schaeffer occurred subsequent to the filing of the complaint and was not embraced in the N.Y. State Court litigation, it was a prominent circumstance brought to the attention of the PBGC in support of the request that PBGC exercise its jurisdiction in connection with the then pending merger. *See* p. 9 *infra.*

[6] The Court did not—and could not—direct that a merger take place because, under the terms of the merger agreement, the merger itself was conditioned upon IRS approval.

to appeal to the New York Court of Appeals was denied the Teamsters Fund in February of 1976. 38 N.Y. 2d 709, 382 N.Y.S.2d 1028, 346 N.E.2d 558 (1976). The effect of ERISA, which was enacted in September 1974 while the suit was pending before the New York Court, was neither litigated nor decided by the New York courts.

On March 24, 1976, the Teamsters Fund petitioned the PBGC to assert jurisdiction and to evaluate its propriety under § 208 criteria to determine whether the merger should be prohibited.[7] PBGC refused to assert jurisdiction. Appendix, p. 94. The grounds for the PBGC's refusal were (a) Section 208 is not effective with respect to mergers involving multiemployer plans until such time as the PBGC issues regulations of general applicability; and (b) ERISA is not applicable in any event because the merger would be the result of a "cause of action" which arose prior to ERISA's effective date and is thereby exempted by 514(b)(1) of the Act.

On March 29, 1976, the Brewery Fund for the first time applied to the IRS for an approval of the merger. The application was made unilaterally and without notice to the Teamsters Fund and the Teamsters participants and beneficiaries as required by ERISA.[8] The application gave no indication that there were serious

[7] Section 208 contains the substantive rules governing mergers of private pension plans. Section 1015(1) provides that a trust maintained under a pension plan must abide by the merger rules in order to acquire and maintain favorable tax treatment (Court of Appeals Slip Opin. at 4, note 3).

[8] Appendix, pp. 95-102; ERISA, § 3001(a), (29 U.S.C. § 1201 (a); I.R.S. Reg. § 11.7476-2 (26 C.F.R. § 11.7476-2); and Rev. Proc. 75-33.

objections to the merger or that the merger would have an adverse impact on the participants and beneficiaries of the Teamsters Fund. One year and eleven months after ERISA had become effective (November, 1976), the merger was approved by the IRS. On October 6, 1978 the IRS remanded the application to the regional office for reconsideration on the ground that the Brewery Fund violated ERISA in failing to give notice of its application to interested parties. (ERISA, Section 3001(a); § 11.7476-2(a) of the temporary regulations; § 1.7476-1 of the final regulations). The matter of IRS approval is still pending.

On April 13, 1977, Respondent Brewery Fund obtained a supplemental order from the New York Supreme Court which declared that the Teamsters and Brewery Funds were merged as of December 31, 1976 and directing the Teamsters Fund to receive all assets of the Brewery Fund and to assume all liability and responsibilities for the Brewery Fund. Appendix, p. 110. The State Court totally ignored Petitioner's argument that ERISA had ousted it of jurisdiction over the merger.

On May 22, 1977 the Brewery Fund moved to have Plaintiff Trustees adjudged in contempt for refusing to proceed with the merger as directed by the New York Supreme Court's supplemental order. On August 19, 1977 Petitioners were adjudged in contempt of the supplemental order and fined the maximum amount permitted by the statute. Having no other options available to them, Petitioners have merged the two Funds rather than suffer penalties for contempt of the New York supplemental order. However, under the guidance of Petitioner's actuaries and consultants, the assets and records of the Brewery Fund are being held and administered separately so that the merger may be dissolved

and assets and liabilities be retransferred to the Brewery Fund pending disposition of judicial proceedings.

On August 22, 1977 the District Court dismissed the Teamsters complaint and granted summary judgment in favor of the PBGC and the Brewery Fund. The court ruled that the New York State court decision respecting the validity and enforceability of the merger agreement was res judicata as to the instant action, and as an additional ground held that application of ERISA would be impermissibly retroactive. In a decision dated January 10, 1979, a division of the Court of Appeals for the District of Columbia Circuit affirmed the District Court's judgment. On February 27, 1979, the Court of Appeals denied the Petition for Reconsideration and Suggestion that the Case be Heard En Banc. The opinion of the Court of Appeals is fully discussed in subsequent sections of this Petition under the heading of Reasons for Granting the Writ.

REASONS FOR GRANTING THE WRIT

I. The Court's Opinion Denying Application of ERISA to the Merger Had a Devastating Impact on the Pension Benefits of 25,000 Teamsters Fund Participants.

The United States District Court granted a motion for summary judgment in favor of respondents Brewery Fund and PBGC based, in part, on its conclusion that "ERISA had no retroactive effect and thus could not be applied where an agreement, and a mature cause of action based thereupon, pre-dated the Act's adoption." Slip Opin. at 6. The Court of Appeals affirmed the judgment of the United States District Court, not on any rationale adopted by that court, but instead on a *sua sponte* application of the doctrine of anticipatory breach, to which it gave decisive weight. The court also

concluded, as a basis for denying the application of ERISA, that allowing state law to govern the contract to merge while ERISA controlled the merger itself would produce an anomalous result, contrary to congressional policy.[9]

Involved here is a highly improvident merger which, if allowed to stand, will require the Teamsters to fund an additional $70,000,000 or more on behalf of the insolvent Brewery Fund. The absorption of this massive liability will require a substantial reduction in the benefits of 25,000 Teamsters Fund participants or the termination of the Teamsters plan itself. This is precisely the situation which §§ 208 and 1015(1) of ERISA were designed to prevent. This Court is therefore called upon to determine whether the participants of the Teamsters Fund were improperly denied the protection of ERISA.

[9] The District Court, in granting summary judgment, principally relied on res judicata, holding that the New York courts could have entertained the issue. The Court of Appeals discussed this issue, but did not resolve it. Neither did the District Court nor the Court of Appeals pass on the principal reason for PBGC's refusal to assert jurisdiction, i.e., that the PBGC had not yet drafted regulations to make §§ 208 and 1015(1) of the Act operational over multi employer plans.

The court in its decision (fn 1, Slip Opin. at 3), stated that the necessary ruling from the IRS was not obtained until September, 1976 because of the Teamsters' recalcitrance in providing necessary documentation. There is no support for this surmise in the uncontested facts. Indeed, the Brewery Workers do not contend that they sought to obtain IRS approval prior to March 9, 1976. Since the court reached its opinion and judgment on the express assumption that the Teamsters' refusal to assist in preparation for the merger was not a breach of the merger agreement (Slip Op. at 9), the question is not in issue and need not be further discussed.

II. The Court, in Failing to Hold That the Merger Agreement Was Governed by ERISA, Decided an Important Federal Question in a Way Which Conflicted With Applicable Decisions of This Court.

Sections 208 and 1015(1) are concerned essentially with the substantive provisions of merger agreements sought to be implemented post-ERISA. They are not concerned with the common law validity of such agreements. These are matters traditionally controlled by state law. That jurisdiction is in no way touched upon by ERISA. In this case, the requirements and protections of ERISA only became significant after the validity of the common law contract to merge was established by the state courts. ERISA jurisdiction over the instant merger was not triggered until the IRS approved the merger, which approval occurred post-ERISA, and when a subsequent order of the New York State Court directed the merger and the concomitant transfer of assets and liabilities. The application of §§ 208 and 1015(1) to the instant merger agreement, therefore, would have been entirely prospective and not retroactive in any respect.

Agreements between private parties may not be implemented in any way which conflicts with the execution of Congressional policy. When Congress, in the exercise of its regulatory authority, preempts an area, and, in doing so, sets forth a regulatory scheme, federal courts are:

> . . . not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its [Congress'] policy, as such a restriction would place the regulation of interstate commerce in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discern-

ment to bring within the range of their agreements.

Sproles v. *Binford,* 286 U.S. 374, 390-391 (1932).

No contract between private parties which is entered into prior to the enactment of comprehensive, specific and preemptive federal legislation can be enforced subsequent to enactment of a comprehensive regulatory scheme if such enforcement would result in frustration of the express will of the legislature. *Sproles* v. *Binford,* 286 U.S. 374, 390-391 (1932) (contracts relating to the use of the highways are deemed to have been made in contemplation of the regulatory authority of the State); *Fleming* v. *Rhodes,* 331 U.S. 100, 197 (1947) (rights acquired by valid judgments are also subject to subsequent federal legislation); *Louisville & Nashville R. Co.* v. *Mottley,* 219 U.S. 467, 482 (1911) (contract to provide free rail transportation made unenforceable by subsequent federal legislation); *S.E.C.* v. *Chenery Corporation,* 332 U.S. 194, 203 (1947) (S.E.C. ruling operates to deny effectiveness to corporate reorganization plan previously lawful); *Manigault* v. *Springs,* 199 U.S. 473, 480 (1905) (state interests to construct a dam override previously existing contract of landowners to the contrary); *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 357 (1908) (landowners' contract to divert water made unlawful by subsequent state legislation); *Chicago B & O Railroad Co.* v. *McGuire,* 219 U.S. 567 (1911) (contractual settlement cannot bar action for damages based on subsequent legislation); *Atlantic Coast Line Railroad Co.* v. *Goldsboro,* 232 U.S. 548, 558 (1914) (contract between railroad and town granting right of way can be modified by subsequent municipal ordinances); *Condor Operating Co.* v. *Sawhill,* 514 F.2d 351, 361 (Emer. App. 1975) (F.E.A. regulation can validly modify existing supplier/purchaser contractual relationships); *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co.,* 159 F.2d 306 (4th Cir. 1947) (preexisting pooling contract between carriers made unlawful by amendments to Interstate Commerce Act); *Switchmens' Union of North America* v. *National Mediation Board,* 135 F.2d 785 (D.C.Cir. 1943), *rev'd on other grounds,* 320 U.S. 297 (1943) (National Mediation Board unit determination can invalidate preexisting collective bargaining contracts). As the Supreme Court stated in *Louisville & Nashville R. Co.* v. *Mottley,* 219 U.S. 467, 482 (1911):

> . . . contracts must be understood as made in reference to the possible exercise of the rightful authority of the governments, and *no obligation of a contract can extend to the defeat of legitimate government authority.* (Emphasis added)

In *Louisville & Nashville R. Co.* v. *Mottley, supra.,* a case remarkably similar to the one at bar, plaintiffs had agreed to settle a personal injury claim against defendant railroad in consideration of lifetime passes. Subsequent to the settlement agreement, Congress enacted a statute precluding the granting or use of such passes. When the railroad refused to continue honoring the passes, plaintiffs sought specific enforcement of the agreement. Ruling for the defendant railroad, the Supreme Court noted, at 219 U.S. 485-486:

> . . . as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts

between themselves, in anticipation of legislation render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted.

Savings clauses such as 514(b)(1) are traditionally treated as a Congressional statement that the act construed not be applied retroactively to deprive one of fully vested rights. *Fleming* v. *Rhodes, supra; Louisville and Nashville R. Co.* v. *Mottley, supra; Brewing Corp. of America* v. *Cleveland Trust Co.,* 185 F.2d 482 (6th Cir. 1950).[10]

Similarly, courts which have construed § 514(b)(1) have treated that section as nothing more than a declaration that ERISA cannot be applied retroactively. *Martin* v. *Bankers Trust,* 417 F. Supp. 923 (W.D.Va. 1976); *Nolan* v. *Meyer,* 520 F.2d 1276 (2d Cir. 1975), *cert. denied,* 423 U.S. 1034 (1975); *Malone* v. *White Motor Corp.,* 46 U.S.L.W. 4295 (1978); *Keller* v. *Graphic Systems,* 422 F. Supp. 1005 (N.D. Ohio 1976); *Reuther* v. *Trustees of Trucking,* 575 F.2d 1074 (3d Cir. 1978); *Wong* v. *Bacon,* 445 F. Supp. 1189 (N.D. Cal. 1978).

It is equally well established that, for the purposes of § 514(b)(1) or similar savings clauses, a preexisting

[10] Respondents sought below to distinguish *Fleming, supra,* as well as *Mottley, supra,* and other cases cited here by arguing that these cases did not involve statutes which contained a provision comparable to § 514(b)(1) exempting pre-existing causes of action. *Fleming* and cases following did contain a § 514(b)(1) type clause. Despite the presence of such provisions, the courts found, in factual contexts nearly identical to the case at bar, that the application of newly enacted statutes was neither retroactive nor barred by the savings clause of the statute. *Fleming, supra; Brewing Corp. of America, supra.*

cause of action which would take the controversy outside of the preemptive statute exists only when there is a mature cause of action in which every significant condition to the action has occurred prior to the enactment of the federal preemptive statute. *See Martin* v. *Bankers Trust Co., supra; Nolan* v. *Meyer, supra.* Conversely, when a critical condition to the cause of action does not occur until after an enactment of the preemptive statute, or when the specific event addressed by the statute does not occur until after enactment, there is no pre-existing cause of action and the matter is governed by the intervening Federal law. *See Fleming* v. *Rhodes, supra; Don't Tear It Down* v. *Washington,* 339 F. Supp. 153 (D.D.C. 1975).[11]

It is submitted that the decisions reviewed here are controlling. Accordingly, the lower court in reliance on these authorities should have directed the PBGC to assert its authority over the merger to protect the Teamsters participants. The court failed to do so. As a consequence, the pension benefits of more than 25,000 Teamster participants will be significantly reduced. Indeed, the continued existence of the plan itself has been seriously jeopardized. A grant of certiorari is required.

III. The Doctrine of Anticipatory Breach Was Improperly Invoked and Seriously Misapplied to Eliminate IRS Approval as a Basis for ERISA Jurisdiction.

The Court of Appeals did not affirm the grant of summary judgment on the theory relied on by the District Court: that application of ERISA to the merger

[11] In the *Don't Tear It Down* case, a Superior Court order permitted demolition of the Willard Hotel was superseded by the subsequent enactment of the Pennsylvania Development Act.

of the Teamsters and Brewery Funds would be impermissibly retroactive. Rather, it *sua sponte* applied the doctrine of anticipatory breach.

While IRS approval, an express condition of the merger contract, occurred post-ERISA, the court, contrary to established law, would not permit such fact to trigger PBGC jurisdiction. The court instead held that the repudiation of the agreement was an anticipatory breach which eliminated IRS approval as a precondition to the merger. In this process, the court implicitly recognized that a pre-ERISA merger agreement could not be implemented post-ERISA except in compliance with §§ 208 and 1015(1). However, solely because of the pre-ERISA repudiation of the merger agreement, IRS approval was deemed forfeited. Through this unprecedented and novel doctrine, apparently based on perceived equities between the parties, the court limited the application of a significant federal statutory protection against an improvident merger.

The Court of Appeals cited only the Restatement (Second) of Contracts, § 277 (1) comment b (Tent. Draft 1974) in support of its conclusion that the:

> "Teamsters Fund's repudiation of its agreement with the Brewery Fund was an anticipatory breach thereof, and *effectively eliminated IRS approval as a precondition to a suit by the Brewery Fund to enforce specifically the agreement's terms.*" (Emphasis added)

Slip Opin. at 10.

Concededly, in the event of the total repudiation of a contract where damages only are sought, the aggrieved party should not be required to perform a useless act, even though it may be an express condition of the contract. 5 Williston, Contracts § 699 p. 344. However, where specific performance is sought as distinguished from damages, no condition necessary to performance may be excused since such is the essence of specific performance. The court, moreover, failed to observe that a condition which can not be fulfilled in any event discharges both parties to a contract, even if an anticipatory breach occurs. Restatement (Second) of Contracts, § 278 (Tent. Draft 1974).

Disapproval of the merger by the IRS would automatically render the agreement null and void, in accordance with the express agreement of the parties, as well as by operation of law. IRS approval in an action for specific performance could *not* be eliminated because of an anticipatory repudiation of the agreement. Indeed, fulfillment of the condition of IRS approval was absolutely necessary to bring the merger to fruition. 5A Corbin on Contracts, § 1141, p. 713.[12]

Finally, the court failed to perceive that conditions which may be eliminated or excused under appropriate circumstances are those which do not involve statutory requirements or the approval of a public agency. Restatement (Second) of Contracts, § 278 (Tent. Draft 1974). The public interest requiring compliance with statutory conditions may not be eliminated where specific performance is sought because of an underlying

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[12] There is no way in which specific performance to compel the merger could take place without IRS approval since such approval is necessary to obtain tax qualification. Surely the Court would not have compelled a merger if IRS disapproved it. Tax qualification is the foundation of a contributory pension program. Indeed, it was an express condition of the contract. The Court's view, therefore, that the breach of contract eliminated IRS approval as a condition for specific performance is puzzling.

breach of contract, anticipatory or otherwise. Indeed, there is no rational relationship between a breach of an agreement and the public interest in achieving a statutory standard where performance of the agreement is compelled.

A state court, in enforcing a contract, may require preliminary steps to be undertaken. It may *not*, however, eliminate the statutory condition enacted to protect the public interest in the performance of the agreement. ***Watson Bros. Transp. Co.*** v. ***Jaffa,*** 143 F.2d 340 (8th Cir. 1944); 5A Corbin on Contracts, § 1141, p. 713; ***Franko*** v. ***Olszewski,*** 25 N.W.2d 593 (1947); ***Kaneko*** v. ***Okudo,*** 15 Cal. Rptr. 792, 195 Cal. App. 2d 217 (1961); ***Bidwell*** v. ***Long,*** 218 N.Y.S.2d 108, 14 A.D.2d 168 (1961).

It must be concluded that the Court of Appeal's unprecedented reliance on the doctrine of anticipatory breach as a basis for avoiding application of ERISA or any other preemptive federal protective statutes is unsupportable. That doctrine does not furnish any justification for ignoring the controlling authorities reviewed in Section 2 of this petition. The court's error significantly diminished ERISA jurisdiction and unfairly deprived more than 25,000 participants of the protection of the merger provisions of that statute. Such an egregrious misapplication of law deserves review by this Court.

IV. It Is Not Anomalous But Consistent With the Purposes of the Statute for State Law to Compel Steps Preliminary to the Merger While Provisions of ERISA Control the Substantive Terms of the Merger.

The court refused to apply ERISA even though it expressly recognized that the Brewery Fund could

not compel a final merger prior to obtaining IRS approval. To do so, the court opined:

> "would produce the anomalous result that state law governed the Brewery Workers' cause of action to force the Fund to proceed with steps preliminary to the actual merger while the provisions of ERISA controlled any subsequent action to bring the matter to fruition—the exact situation the preemption and savings provisions of § 514 of ERISA were designed to avoid."

Slip Opin. at 10, 11.

We submit that this holding is an egregious misapplication of the statute. While a state cause of action may have occurred prior to the enactment of ERISA, the court failed to fully recognize that there is a fundamental distinction between an action for specific performance relating to the validity of the merger agreement and agency action measuring the merger against the standards set forth in ERISA. Enforcement of the ERISA merger criteria is vested exclusively with the PBGC and the federal courts. Yet, the lower court, under the guise of finding an "anomaly", would eliminate PBGC jurisdiction over the instant merger. Such a ruling flies in the face of the statute fixing January 1, 1975 as the effective date of §§ 208 and 1015(1), the merger sections of ERISA.

Significantly, it also departs from clearly expressed congressional intent. Senator Harrison Williams, chairman of the Senate Committee on Labor and Public Welfare, in presenting the conference report, declared that the preemptive substantive provisions of ERISA are to be given a broad interpretation and § 514(b)(1) is to be narrowly construed. Senator Williams stressed:

> that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent state and local regulations of employee benefits plans. This principle is intended to apply in its broadest sense to all actions of state or local governments, or any instrumentality thereof, which have the force or effect of law. 1974 U.S. Code Cong. & Admin. News pp. 5188-89.

The lower court's holding giving § 514(b)(1) an expansive construction and a narrow interpretation to the preemptive provisions set forth in § 514(a) stands the statute on its head since it permits the exception, contrary to established law and statutory intent, to totally obliterate the basic preemptive provisions of the statute.

It is not uncommon for disputes involving the validity of a contract to be determined by state law while the ultimate approval of substantive provisions of the agreement is controlled by a federal regulatory statute or a state licensing authority. The fact that a contract requires the approval of a public agency is not a bar to a decree compelling a party to execute the necessary documents for the consummation of a contract or transfer. The decree, however is subject to the ultimate approval of the public agency. ***Watson Bros.* v. *Jaffa*, *supra*.** Such is the case in the transfer of ownership of a radio station, interstate trucking routes, or liquor licenses. A dispute respecting the common law enforceability of the contract of sale in such cases will be governed by state law, while the ultimate issue will be

governed by the appropriate regulatory agency. ***See***, *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945); *see also*, *Regents of University System of Georgia*, 338 U.S. 586 (1950); ***Watson Bros.* v. *Jaffa***, *supra*; ***Franko* v. *Olszewski***, 316 Mich. 485, 25 N.W.2d 593 (1947); ***In re Fisher***, 98 F. 89 (D.C.Mass. 1899); ***Fisher* v. *Cushman***, 103 F. 860, 51 L.R.A. 292 (1900); ***In re McArdle***, 126 F. 442 (D.C.Mass. 1903); ***In re Becker***, 98 F. 407 (D.C.Pa. 1899); ***In re Wiesel***, 173 F. 718 (D.C.Pa. 1909); ***In re John F. Doyle***, 209 F. 1 (3rd Cir. 1913); 10 Williston, Contracts (3rd Ed.) § 1134 A, p. 351. Cases cited by petitioners, involving § 514(b)(1), or similar clauses, have held that steps preliminary to effectuation of the transactions may be governed by state law, yet ultimate fruition is governed by the intervening Federal standards. See ***Fleming* v. *Rhodes***, 331 U.S. 100 (1947) (judgment for eviction governed by state law; enforcement of judgment and actual eviction governed by intervening Federal prohibition); ***Brewing Corp. of America* v. *Cleveland Trust Co.***, 185 F.2d 482 (6th Cir. 1950) (sale and shipment governed by state law, payment governed by intervening Federal prohibition).

The court termed these concepts anomalous. They are nothing of the sort. Actually, in contrast with the Appellate Court's treatment, which destroys significant statutory rights, the views urged here affect a sound accommodation between § 514(b)(1) and the substantive preemptive, protective provisions of the statute.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1821

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, ET AL., APPELLANTS

v.

PENSION BENEFIT GUARANTY CORPORATION, ET AL.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 77-0100)

Argued November 1, 1978

Decided January 10, 1979

Judgment [illegible] this [illegible]

S. G. Lippman, with whom *Thomas J. Hart* was on the brief, for appellants.

William F. Hanrahan, Attorney, Pension Benefit Guaranty Corporation, with whom *E. Calvin Golumbic*,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Assistant General Counsel, was on the brief, for appellee Pension Benefit Guaranty Corporation.

Bettina B. Plevan, with whom *George G. Gallantz* was on the brief, for appellee Brewery Fund. *David J. Taylor* and *Charles R. Work* also entered appearances for appellee Brewery Fund.

Susan Joan Martin entered an appearance for appellee Brewery Workers Pension Fund and Trustees.

Before J. EDWARD LUMBARD,* *Senior Circuit Judge* for the Second Circuit, and TAMM and LEVENTHAL, *Circuit Judges*.

Opinion for the court filed by *Senior Circuit Judge* LUMBARD.

LUMBARD, *Senior Circuit Judge*: The New York State Teamsters Conference Pension and Retirement Fund ("Teamsters Fund") sued in the district court to compel the Pension Benefit Guaranty Corporation ("PBGC"), a government corporation charged with various administrative responsibilities under the Employee Retirement Income Security Act of 1974 ("ERISA" or "the Act"), 29 U.S.C. § 1001 *et seq.*, to intervene and disapprove a 1973 merger agreement between the Teamsters Fund and Brewery Workers Pension Fund ("Brewery Fund"). We affirm the order of the district court denying the Teamsters Fund request for declaratory and injunctive relief and granting summary judgment to defendants PBGC and Brewery Fund.

The essential facts are uncontested. The Teamsters Fund and the Brewery Fund are multiemployer defined benefit pension plans within the meaning of §§ 3(2), (35), and (37) of ERISA. A "multiemployer plan" is a pension plan to which no one employer contributes more than 50%

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

of the total yearly contributions and under which benefits are payable to a retired participant even if his employer ceases to make contributions. ERISA § 3(37). In August of 1973 the Teamsters Fund and the Brewery Fund agreed to merge their two funds in order to "minimize the impact upon the funds of possible future declines in employment or other subsequent events affecting any one employer or industry." The merger agreement was made contingent on its approval by participants in the Brewery Fund and on obtainment of a ruling from the Internal Revenue Service that the merged plan would be eligible for favorable tax treatment.[1]

Some six months after the merger agreement was signed, Rheingold Breweries, one of the two largest contributing employers to the Brewery Fund, announced that it intended to terminate its operations. This development made the merger much less attractive to the Teamsters Fund since it dramatically reduced the Brewery Fund's prospective contributions to the joint plan without a proportionate reduction in the joint plan's prospective liabilities to Brewery Fund participants. Consequently, the Teamsters Fund, in February of 1974, citing changed economic circumstances, repudiated the merger agreement and refused to take any further steps to consummate the merger.[2] The Brewery Fund responded several

[1] The merger agreement was ratified by Brewery Fund participants in November of 1973. The necessary tax ruling from the IRS was not obtained until November of 1976, apparently because of the Teamsters Fund's recalcitrance in providing necessary documentation.

[2] The Brewery Fund's already bleak economic condition was made worse when the F&M Schaefer Brewing Corporation closed its New York operations in January of 1976. The Schaefer action, however, was taken well after the Teamsters Fund's decision to repudiate the merger agreement.

months later with a suit for specific performance in New York State Supreme Court. That court, on May 1, 1975, ruled that the merger agreement remained valid and enforceable and ordered the Teamsters Fund specifically to perform its obligations thereunder. The lower court judgment was unanimously affirmed by the Appellate Division, Second Department, in September of 1975, *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 49 A.D.2d 755, 374 N.Y.S.2d 590 (App.Div.2d Dept., 1975), and leave to appeal to the New York Court of Appeals was denied the Teamsters Fund in February of 1976. 38 N.Y.2d 709, 382 N.Y.S.2d 1028, 346 N.E.2d 558 (1976).

In September of 1974, while the Brewery Fund's action for specific performance was pending before the New York courts, Congress enacted ERISA. The Act was designed to protect individual pension rights and established minimum financial and fiduciary standards for private employee benefit plans as well as a system of benefit insurance. Of specific relevance to this proceeding are §§ 208 and 1015(1) of ERISA, parallel provisions that set out pre-conditions for the merger of pension plans within the Act's jurisdiction.[3] In essence, the merger of two pension plans is prohibited unless each participant would be entitled to receive a benefit "immediately after the merger . . . equal to or greater than the benefit he would have been entitled to receive immediately before the merger." ERISA §§ 208 and 1015 (1). That restriction, however, applies "in the case of

[3] § 208 contains the substantive rules governing mergers of private pension plans. Section 1015(1) provides that a trust maintained under a pension plan must abide by the merger rules in order to acquire and maintain favorable tax treatment.

a multiemployer plan only to the extent determined by the PBGC." Id.

Where applicable, ERISA preempts state law concerning employee benefit plans, ERISA § 514(a), and, with exceptions not here relevant, provides for exclusive federal jurisdiction over actions brought under the Act. ERISA § 502(e)(1). Congress made clear, however, that the transition from state to federal regulation was to be gradual by providing that ERISA would not preempt state law with respect to "any cause of action which arose, or any act or omission which occurred before January 1, 1975." ERISA § 514(b)(1). Congress thus ruled out concurrent federal and state regulation[4] but left to the states "what is essentially a clean-up role, . . . the disposition of causes of action and disputes with respect to employee benefit plans existing before January 1, 1975." *Azzaro v. Harnett*, 414 F.Supp. 473, 474 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 93 (2nd Cir. 1977).

The Teamsters Fund first made its claim that ERISA applied to its merger agreement with the Brewery Fund in March of 1976 when it requested the PBGC to disapprove the merger under §§ 208 and 1015(1) of the Act. By letter dated June 4, 1976, the PBGC declined that request on grounds 1) that the merger agreement

[4] In introducing the conference report on ERISA, Senator Harrison A. Williams Jr., Chairman of the Senate Committee on Labor and Public Welfare, stated:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 1974 U.S. Code Cong. & Admin. News pp. 5188-89.

and the Teamsters Fund's repudiation thereof occurred prior to January 1, 1975 and were thus outside the PBGC's jurisdiction by virtue of the savings provision in § 514(b)(1) of ERISA; and 2) that the PBGC had not yet drafted regulations to make §§ 208 and 1015(1) of the Act operational with respect to multiemployer plans such as the Teamsters Fund and the Brewery Fund.

Following its rebuff from the PBGC, the Teamsters Fund, in January of 1977, filed the instant action in the District Court for the District of Columbia. The Fund sought a declaration that §§ 208 and 1015(1) of ERISA were applicable to its agreement with the Brewery Fund and an injunction directing the PBGC to intervene and assert jurisdiction over the merger. The district court's denial of that relief and its order granting summary judgment for the defendants Brewery Fund and PBGC rested on two legal determinations. The court concluded first that the Teamsters Fund's claims as to the applicability of ERISA were res judicata since they could have been raised as affirmative defenses to the Brewery Fund's state court action for specific performance.[5] In addition, the court ruled that ERISA had no retroactive effect and thus could not be applied where an agreement, and a mature cause of action based thereupon, pre-dated the Act's adoption.[6]

[5] The question of ERISA's applicability to the merger agreement was not raised before the New York State Supreme Court, but apparently was brought to the attention of the Appellate Division. That court's opinion does not address the issue, however.

[6] On this appeal, defendants PBGC and the Brewery Fund urge a third ground in support of the decision below. Since the merger provisions of §§ 208 and 1015(1) of ERISA are expressly made applicable to multiemployer plans such as the Teamsters Fund and the Brewery Fund "only to the extent determined by the PBGC," the defendants contend that the fact that the PBGC has not yet promulgated regulations governing multiemployer plans provides a further reason that ERISA cannot be applied to the merger agreement. Because of our disposition of the other issues presented by this case, there is no need for us to reach this question.

In contending on this appeal that the issues raised by this action are not res judicata, the Teamsters Fund argues that the normal rule barring a party from litigating in federal court claims that were or could have been raised in a prior state court action does not apply to matters with respect to which federal courts have exclusive jurisdiction. Though the Teamsters Fund does not appear to deny that the New York state courts could have entertained, as an affirmative defense, an argument that the Teamsters Fund—Brewery Fund agreement violated the merger provisions of ERISA, it contends that any determination the state courts might have made as to the applicability of the Act would not be entitled to binding effect in a subsequent federal action.

Primary support for the Teamsters Fund's position traces to the Second Circuit's decision in *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, *cert. denied*, 350 U.S. 825 (1955). In that case, plaintiff's treble damage action charged a conspiracy to monopolize trade, a claim that had been raised defensively in a state court contract action. Vacating a stay of the federal anti-trust suit pending final judgment in the state court action, Judge Learned Hand's opinion held that the state court's disposition of the conspiracy claim would not be entitled to collateral estoppel effect since the federal courts' exclusive jurisdiction over treble damage actions "impl[ied] an immunity of their decisions from any prejudgment elsewhere." Id. at 189.

The decision in *Lyons* has received a mixed response from legal commentators, *compare* 1B J. Moore, Federal

Practice § 0.445 at 4113-14 (2d ed. 1974) *with* Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1335, n.20 (1977), and a number of courts have refused to follow it. *See*, e.g., *Azalea Drive-In Theatre, Inc. v. Hanft*, 540 F.2d 713 (4th Cir. 1976). A rule that prevents parties from relitigating claims that could have been or were raised in a prior forum does, in fact, have much to recommend it. At the same time, we note that the strongest case for adherence to the *Lyons* rationale exists in situations where, as is true in the instant case, 1) the party against whom the estoppel is urged did not elect the state court forum, *see*, Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations, 53 Va.L.Rev. 1360, 1365-66 (1967); and 2) the federal claim to which the state court judgment is set up as a bar turns predominantly upon a legal rather than factual determination and involves the interpretation of federal rather than state law.

We need not, however, resolve this difficult question of federal law since we agree with the district court that the federal court lacks subject matter jurisdiction due to the fact that the execution and repudiation of the merger agreement occurred prior to the effective date of ERISA. The Teamsters Fund does not dispute that ERISA's preemption of state law is conditioned by § 514 (b)(1) of the Act which indicates that ERISA does not apply to "any cause of action which arose, or any act or omission which occurred before January 1, 1975." Nor does it deny that the merger agreement and its repudiation thereof predated January 1, 1975. What the Teamsters Fund does contend is that no *cause of action* existed before January 1, 1975, since the merger agreement was made contingent on a favorable IRS ruling

and no such ruling was obtained until November of 1976.[7]

This objection, however, disregards both the character of the merger agreement and the consequences of the Teamsters Fund's repudiation of it. In the first place, not all of the Teamsters Fund's obligations under the merger agreement were contingent on IRS' approval. For example, both parties were expressly obligated to execute "any and all documents necessary to implement" the agreement, which clearly would include the documents needed to support an application for a ruling from the IRS. The Teamsters Fund, however, refused to provide such documentation,[8] and a cause of action to compel its cooperation was obviously not contingent on IRS' approval.

But even assuming that the Teamsters Fund's refusal to assist in preparations for the merger was not a breach of the merger agreement by non-performance, there would be no merit to its argument that the Brewery Fund's cause of action did not arise prior to IRS' approval. Under traditional doctrine, repudiation constitutes a breach of contract even though made in advance

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[7] The Teamsters Fund also contends that regardless of whether a cause of action arises prior to January 1, 1975, §§ 208 and 1015(1) of ERISA must be read to prohibit any merger which *occurs* after that date. This argument simply ignores the savings provision in § 514(b)(1) of the Act. The Teamsters Fund offers no explanation as to why Congress would leave to state law causes of action arising before January 1, 1975 but make their enforcement after that date contingent on the provisions of ERISA.

[8] Part of the relief requested by the Brewery Fund, and granted by the New York Supreme Court, was an order directing the Teamsters Fund "to execute those documents that are necessary in order to request approval from the Internal Revenue Service pursuant to the terms of the integration agreement."

of the time performance is due. Restatement (Second) of Contracts § 277(1) (Tent, Draft 1974). The Teamsters Fund's repudiation of its agreement with the Brewery Fund was an anticipatory breach thereof, and effectively eliminated IRS' approval as a pre-condition to a suit by the Brewery Fund to enforce specifically the agreement's terms. *Id.* at § 277, comment b. Indeed, the Teamsters Fund's own legal maneuvering suggests its awareness of this fact. Certainly the Teamsters Fund did not think that its repudiation of the merger agreement in February of 1974, over two years before the necessary IRS ruling was obtained, was an idle step without legal consequence. Rather, because it believed that the merger agreement was unenforceable, the Teamsters Fund sought to test the contract's validity by openly renouncing its terms. Consistent with this intention, the Teamsters Fund's defense to the Brewery Fund's suit for specific performance was that changed economic conditions nullified the agreement, not that the Brewery Fund's suit on the contract was premature.

In sum, a cause of action on behalf of the Brewery Fund to enforce the merger agreement according to its terms was not contingent upon IRS' approval of the merger. To the contrary, the Brewery Fund's cause of action arose at the time of the Teamsters Fund's repudiation and thus is well outside the scope of ERISA by virtue of § 514(b)(1). It should also be recognized that the fact that the Brewery Fund could not have sued prior to the IRS ruling to compel a final merger of the two funds does not alter the conclusion that ERISA cannot apply. To rule otherwise would produce the anomalous result that state law governed the Brewery Fund's cause of action to force the Teamsters Fund to proceed with steps preliminary to the actual merger while the provisions of ERISA controlled any subsequent action to bring the merger to fruition—the exact situa-

tion the preemption and savings provisions of § 514 of ERISA were designed to avoid. By mandating that ERISA would preempt state law and yet leaving to state law the determination of causes of action predating January 1, 1975, Congress sought to provide an orderly transition from state to federal regulation. The result we reach today is consistent with that objective.

Judgment affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0100

NEW YORK STATE TEAMSTERS CONFERENCE
PENSION AND RETIREMENT FUND, *et al.*, *Plaintiffs*,

v.

PENSION BENEFIT GUARANTY CORPORATION, *et al.*, *Defendants*.

Memorandum Opinion

(Filed Aug. 22, 1977)

BARRINGTON D. PARKER, *District Judge:*

This proceeding concerns the effort of the plaintiffs, New York State Teamster Conference and Pension Retirement Fund and its trustees (Teamsters Fund), to void a 1973 merger agreement with the Brewery Workers Pension Fund and its trustees (Brewery Fund). The Teamsters Fund seeks declaratory and injunctive relief against the defendants, the Brewery Fund and the Pension Benefit Guaranty Corporation (PBGC or Corporation). The two funds are multiemployer pension trusts operated by labor unions located in New York State. The PBGC, a government corporation, was established by the Employee Retirement Income Security Act of 1974, (ERISA or Act), 29 U.S.C. § 1001 *et seq.* It serves as an insurer of pension plans covered by the Act and is otherwise responsible for the regulation of voluntary private pension plans.

Jurisdiction is premised upon 28 U.S.C. § 1331 and 29 U.S.C. §§ 1132 and 1303(f).[1] Plaintiff request (1) a declaration that certain restrictive provisions of ERISA are applicable to the merger and require intervention by the PBGC; and (2) an injunction directing the PBGC to make a determination whether the merger will adversely affect the participants and beneficiaries of the merger and thus violate the Act.

[1] While plaintiffs allege jurisdiction based on 5 U.S.C. § 701 *et seq.*, those provisions do not afford an implied grant to district courts of subject matter jurisdiction to review agency decisions. Califano v. Sanders, —— U.S. ——, 97 S.Ct. 980.

There are no material issues of fact, and the parties have filed cross motions for summary judgment. After consideration of the entire record, the Court concludes that the defendants are entitled to summary judgment and that the complaint should be dismissed.

The defendants' motions raise a number of legal issues: that the plaintiffs are barred by the doctrines of *res judicata*, collateral estoppel and laches; that this Court lacks subject matter jurisdiction because the execution and breach of the merger agreement and all claims arising thereunder, occurred prior to ERISA's effective date; and that certain restrictive provisions of the statute preclude PBGC intervention. While these issues are all substantial, the threshold questions concerning *res judicata* and the lack of subject matter jurisdiction are sufficient to defeat plaintiffs' claims for relief.

In August, 1973, the Teamsters Fund and the Brewery Fund entered into a merger agreement. In February, 1974, the Teamsters Fund repudiated the agreement and refused to consummate the merger. Several months later the Brewery Fund sued for specific performance of the agreement in the New York Supreme Court, Queens County. That court entered judgment for the Brewery Fund on May 1, 1975, and (1) declared that the agreement was valid, binding and enforceable between the parties; and (2) directed the Teamsters specifically to perform their obligations thereunder. The lower court judgment was affirmed by the Appellate Division of the New York State Supreme Court in September, 1975; leave to appeal to the New York Court of Appeals was denied on February 10, 1976.

When the New York State Supreme Court action was filed in early 1974, the ERISA legislation relating to pension mergers had not been passed. However, by September, 1974, approximately eight months before the New York court granted summary judgment for the Brewery Fund, federal legislation was enacted. A comprehensive statute, ERISA covers single-employer plans where one employer contributes to the retirement fund as well as multi-employer plans, as here, where more than one employer contributes. The Act establishes minimum standards for vesting and funding of pension plans, standards of fiduciary responsibility, and a system of benefit insurance. In addition, Sections 208 and 1015 of the Act [2] prescribe preconditions for the merger of plans subject to its jurisdiction. Each of these sections has parallel provisions which prevent the merger of two pension plans unless each participant would receive a benefit "immediately after the merger . . . equal to or greater than the benefit he would have been entitled to receive immediately before the merger." They apply, however, "in the case of a multiemployer plan only to the extent determined by the *Pension Benefit Guaranty Corporation.*" (Emphasis added).

The Teamsters Fund contends that the latter provision requires the Corporation to make an individual determination as to whether the Teamsters Fund-Brewery Fund merger violates Sections 208 and 1015. The defendant Brewery Fund asserts, however, that plaintiffs' claims are barred by *res judicata* since the issues now raised in this Court should have and could have been raised in the 1974 proceedings before the New York State Supreme Court.

It is clear that the Teamsters were not barred from asserting as an affirmative defense in the New York proceedings that federal jurisdiction was exclusive and that

[2] Pension plans and merger agreements must be approved by the Internal Revenue Service under applicable sections of the Internal Revenue Code relating to tax deductions and exemptions.

the merger would violate the Act. In that court, as here, the Teamsters sought to avoid the merger because of adverse economic conditions experienced by the Brewery Fund. They did not, however, claim invalidity of the merger because of preemption by a federal statute (ERISA), despite the fact that there is ample New York precedent supporting such a course of action. *Berry Packing v. Packer's Super Markets,* 45 Misc. 2d 40, 41, 255 N.Y.S. 2d 691, 692 (1965); *Remington Rand v. I.B.M.,* 167 Misc. 108, 3 N.Y.S. 2d 515 (1937). In upholding the rights to raise as a defense a claimed violation of the federal antitrust laws, the *Remington Rand* court said:

> [T]he federal laws cannot be used as a basis for affirmative relief in our state courts, since jurisdiction with respect to the enforcement of those laws lies exclusively in the federal courts . . . However, a defense that a cause of action does not lie by reason of a violation of the federal laws is available in an action brought in the courts of this state.

167 Misc. at 115; 3 N.Y.S. at 522.

Likewise, *res judicata* precludes a federal court from asserting jurisdiction over claims which could have been presented in a prior state court proceeding. *Cromwell v. County of Sac.,* 94 U.S. 351 (1877); *Scoggin v. Schrunk,* 522 F.2d 436 (9th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976); *Lovely v. Laliberte,* 498 F.2d 1261 (1st Cir. 1974), *cert. denied,* 419 U.S. 1038 (1974). A party may not "fragment a single cause of action and . . . litigate piecemeal . . . issues which could have been resolved in one action." *Scoggin v. Schrunk,* 522 F.2d at 437.

The 1975 New York State Supreme Court judgment was a decision on the merits and involved both the Teamsters Fund and the Brewery Fund and the same cause of action presented here. Thus, the doctrine of *res judicata* will preclude litigation of "not only . . . every ground of recovery

of defence actually presented in the [New York] action, but also . . . every ground which might have been presented." *Cromwell v. County of Sac.,* 94 U.S. at 353. The Brewery Fund cannot be called upon to relitigate the merger's validity in this Court simply because a new legal theory has been interposed.

There is an added reason why the defendants, and especially the PBGC, must prevail. While it is true that, where applicable, ERISA preempts state and local law governing employee benefit plans and provides exclusive federal jurisdiction, the law has no retroactive effect. It is an accepted rule of statutory construction that absent a clear and unmistakable contrary legislative intent, statutes are not to be given retroactive effect. 2 Sutherland Statutory Construction § 41.04 at 252 (4th ed. 1973). Similarly, the United States Supreme Court has stated that:

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'

Greene v. United States, 376 U.S. 149, 160 (1964), *quoting, Union Pac. R. Co. v. Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913). Moreover, the legislative history of ERISA and other federal courts that have interpreted the statute indicate that the Act does not apply to events that predate it. *Martin v. Bankers Trust Co.,* 417 F. Supp. 923 (W.D.Va. 1976); *Morowitz v. Bakery Drivers, Local 802 Pension Fund,* 79 Lab. Cas. ¶ 11,602 (E.D.N.Y. 1976); *Nolan v. Meyer,* 520 F.2d 1276, 1278 n.2 (2d Cir. 1975), *cert. denied,* 423 U.S. 1034 (1975).

In the *Martin* case, a former employee who had terminated his employment some three months prior to the passage of ERISA sued under the Act claiming benefits allegedly due from a pension fund. The defendants, the former employer and the trustee and administrator of the fund, sought dismissal of the complaint for lack of subject matter jurisdiction. Ruling in favor of the defendants, the court cited *Greene* for the general rule as to statutory construction and *Nolan* for the rule relating to the construction of ERISA. The court concluded that the plaintiff could not bring the suit since the "cause of action . . . theoretically arose prior to the time the law [ERISA] existed." *Id.* at 925.

Similarly, in *Morowitz,* the widow of a former union member brought suit in a local New York court against a pension fund for benefits allegedly due her individually and as executrix of her late husband's estate. The subject of the suit, whether plaintiff was entitled to the payment of benefits during a preceding 36-month period, was said by the defendant to fall under ERISA, and the case was removed to the federal district court for the Eastern District of New York. That court, upon motion, remanded the case to the New York court stating that "[n]o sound reason . . . [was] apparent for holding that the statute should be retroactively applied to an action fully matured prior to . . . [ERISA's enactment]." *Id.* at 21,602.

Here, the agreement to merge and the Teamsters' breach occurred well before the passage of ERISA. Since a mature cause of action existed prior to the Act's enactment, neither the Court nor the PBGC should interfere at this point.

The defendants are entitled to summary judgment and an appropriate order will be entered.

Dated: August 22, 1977

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge